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In the Supreme Court of the United States.

OCTOBER TERM, 1892.

UNITED STATES, APPELLANT,
v.
RICHARD JONES. } No. 312.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF ALABAMA.

BRIEF FOR APPELLANT.

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BRIEF FOR APPELLANT.

STATEMENT.

The claimant in the court below brought suit against the United States in the district court of the Unites States for the southern district of Alabama for fees alleged to be due him for certain services rendered by him for appellant, as clerk of said court, subsequent to July 1, 1887.

The fees claimed are set forth—

1. In Exhibit A, with the first petition, which exhibit is a part of that petition. The sum there claimed is $226.25.

2. In Exhibit C, with the additional petition (Rec., pp. 5, 6), and made part of that petition. The sum there claimed is $156.95.

An order was made consolidating both petitions. The pleas are shown in the Record (p. 15).

The court below found that the claimant "as such clerk actually performed the services in the account sued on as therein stated," and, as a conclusion of law, that he is entitled to recover from the United States the sum of $222.35, as due on said accounts.

The items of the accounts (Exhibits) allowed by the court are set forth in the opinion. (Rec., pp. 11 to 14.)

ASSIGNMENT OF ERROR.

First. The court below erred in its conclusions of law based upon the facts found that the plaintiff was entitled to recover of the defendants for the following items set forth in the opinion of the court. (Rec. pp. 12, 13 to wit, items Nos. 5 to 16 inclusive, 17, 18 to 23, and 25 to 28 inclusive, 49, 24 and 56, 29 to 48 inclusive.)

Second. The court below erred in ordering, adjudging, and decreeing that the said plaintiff should have and recover of and from the United States the sum of $292.35, together with the costs of this suit.

ARGUMENT.

Some of the items are insignificant in amount, and it is only in order to have the matter judicially determined for the benefit of the accounting officers as well as the officers of the courts that the law questions are now brought to this court for final decision.

I.

ITEMS IN DISPUTE.

(1) *Items 5 to 16, inclusive.*—These are "charges for entering orders of the court approving marshals' accounts," making copies thereof, and attaching certificates to copies of the order approving the accounts.

In *United States* v. *Van Duzee* (140 U. S. R., 169), the Supreme Court held that the marshal "is no more liable for the expense of entering the orders of approval of such accounts, or for the certified copies of such orders, than he is for the expense of auditing such accounts at the Treasury Department," and that the expenses attendant thereon "are proper charges against the Government."

If the law contemplates that the mode of verification is to involve expenses, then the allowance of these charges is both lawful and just. But we respectfully suggest that the statute does not contemplate that any expenses shall be incurred in the matter for which either the Government or the officers of the court shall be liable.

The "act regulating fees and costs and for other purposes," approved February 22, 1875, Chap. 333 (18 Stat. L., 333), provides:

> That before any bill of costs shall be taxed by a judge, or other officer, or any account payable out of the money of the United States shall be allowed out of the Treasury in favor of clerks, marshals, or district attorneys, the party claiming such account shall render the same, with the vouchers and items thereof, to a United States circuit or district court, and in presence of the district attorney or his sworn assist-

ant, whose presence shall be noted on the record, prove in open court by his own oath, or that of other persons having knowledge of the facts, to be attached to the account, that the services therein charged have been actually and necessarily performed as therein stated; and that the disbursements charged have been fully paid in lawful money; and the court shall thereupon cause to be entered of record an order approving or disproving the account, as may be according to law and just. * * *

Nothing contained in this act shall be deemed in any wise to diminish or affect the right of revision of the accounts to which this act applies by the accounting officers of the Treasury, as exercised under the laws now in force.

It is to be observed that the prescribed proceedings are distinct from the taxation of costs. "Costs" are not taxable against the United States, except by express law. When taxed in courts of the United States they are to "be included in and form a portion of a judgment or decree against the losing party." (Rev. Stat., 983, 984.) Hence, as the judgments or proceedings of courts can not be reviewed by the accounting officers of the Treasury, the approval of accounts by the court under the act of 1875 must be regarded *not as a judicial act*, but "merely as a step or process in the executive business of settling accounts." (*Waters* v. *United States*, 21 C. Cls. R., 30; *Knox* v. *United States*, 23 C. Cls. R., 367; s. c. 128 U. S., 230.)

It is to be further observed that the act of 1875 makes no provision for compensating the clerks, district attorneys, marshals, and commissioners for the additional duty it imposes upon them. It requires these officers to make

their accounts and vouchers in duplicate and, excepting commissioners, to attend in court to prove the accounts and vouchers. It requires the clerk to forward the original accounts and vouchers to the Treasury Department, and to retain the duplicates in his office for public inspection at all times. If the clerk is entitled to compensation for his services under that act, it would seem to follow that the other officers are also entitled to compensation for the labor imposed upon them. Yet the act provides none either for them or the clerks.

If the services were such as those for which the fee bill provides, the right of the clerk would be plain. But the compensation of the fee bill is provided only for services performed in the administration of justice by the courts, for services which pertain, more or less, to the judicial department. Certainly, therefore, the clerk of the court can recover no "fee," as such, for doing anything required of him by the act of 1875. The most that can be said in favor of giving him compensation for such services is that there is an implied contract for a *quantum meruit*, and that the fee bill may be referred to as furnishing a proper measure of damage when he sues the United States for compensation. But against this suggestion we have the express prohibition of section 1765 of the Revised Statutes. We find appropriations for compensation of officers of courts under the fee bill, but none for their services under the act of 1875.

This act must be construed as imposing additional duties upon the officers of the courts. There are many similar acts as to other officers. And in respect to such acts it has always been held that when no compensation

was provided by law for the additional duties none could be recovered in the courts; in other words, that the officer accepts or retains his office *cum onere*.

A familiar instance of a statute which imposes an immense amount of labor upon the clerks of a court and the attorneys of the Government without providing extra compensation for their labor, is the *Act of March* 3, 1883, chapter 116 (22 Stat. L., 485). Like the proceedings under the act of 1875, the proceedings of the Court of Claims upon claims referred to it under the act of 1883 are not judicial, and the reports made to Congress are not an exercise of the judicial power. Under the former act the proceedings may be reviewed by the accounting officers, and under the latter act the proceedings of the Court of Claims may be reviewed by the committee or House to which the report of the court is made. There may be an equitable claim for extra compensation of clerks and attorneys, and other officers of the courts, under both acts, but it is respectfully submitted that such claims have no legal standing that can be recognized by the courts.

(2) *Item* 17.—In addition to the foregoing objections, which fully apply to this item, there is the further objection that we know of no law authorizing courts to issue orders to the marshal to pay supervisors of elections or special deputies. Section 2031 of the Revised Statutes prescribes the pay of these officers, but not the mode of paying, hence the general mode is to be followed, to wit, the payments are to be made by the marshal as a disbursing officer from funds advanced to him from the Treasury for that purpose, a mode wholly and exclusively within the control of the executive branch of the Government.

(3) *Items* 18 *to* 23, *and* 25 *to* 28 *inclusive, and item* 49.—These are charges for filing the marshal's accounts and vouchers.

We urge the same objections here that are made to items 5 to 16 inclusive (*supra*), and make the further objections that the filing of each voucher separately was not only wholly unnecessary, but obviously improper, because vouchers belong to and are part of the account to which they pertain. The account and vouchers are practically one paper or record.

(4) *Items* 24 *and* 56.—These are "charges for making final records." By the finding and the statement of the court it appears that recording orders of commitment are only allowed in these items.

Section 1030 of the Revised Statutes says:

> No writ is necessary to bring into court any prisoner or person in custody, or for remanding him from the court into custody, but the same shall be done on the order of the court or the district attorney, for which no fee shall be charged by the clerk or marshal.

In such a case the order remanding the prisoner may be verbal, hence not intended to be matter of record. Besides this, if the order of commitment should appear in the "final record," the fee provided in the tenth and eleventh clauses of section 828 of the Revised Statutes would include this service.

(5) *Items* 29 *to* 48 *inclusive*.—The objections to items 5 to 16 (*supra*) apply in all respects to these items.

II.

In addition to the foregoing reasons, the judgment is erroneous because it does not appear that the amount of the judgment together with the compensation already paid to appellee as clerk of the court would not increase his emoluments beyond the limits prescribed by law for his office. This proposition needs no discussion here, as it has been fully discussed in *United States* v. *Thomas Fletcher* (No. 783), now pending on appeal in the Supreme Court, and recently submitted under rule 20.

Respectfully submitted.

FELIX BRANNIGAN,
Assistant Attorney.
CHARLES H. ALDRICH,
Solicitor-General.

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WM. W. DUDLEY,
LOUIS T. MICHENER,
RICH'D R. McMAHON,
Attorneys for Appellee.

WASHINGTON:
GIBSON BROS., PRINTERS AND BOOKBINDERS
1892.

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THE UNITED STATES. APPELLANT. *v.* RICHARD JONES.	*No.* 312.

Submitted under the 20th Rule.

STATEMENT OF THE CASE.

This was a consolidation of two actions brought by the appellee, Richard Jones, March 30 and April 18, 1889, in the District Court of the United States for the Southern District of Alabama, for the recovery of $435.70 for official services performed by him as Clerk of the District Court of the United States for that district from July 1, 1887, to December 31, 1888, and from January 1, to March 30, 1889, respectively (R. p. 14).

The items of the accounts are 57 in number. As most of them are of the same character, they may be briefly classified as follows:

1. Filing separate papers sent up by Commissioners	$22	00
2. Issuing more than one subpœna in a case		50
3. Entering order of court overruling motion to quash indictment		15
4. Balance on account for July, 1888, allowed by the First Comptroller but subsequently withheld	107	25
5. Entering orders of court approving accounts of the District Attorney, Marshal and other officers, making two copies of said orders, affixing certificate and seal to each of said orders	30	45
6. Making duplicate copies of order of court for Marshal to pay Supervisors and Special Deputy Marshals, with certificates and seals thereto	2	20
7. Filing the Marshal's accounts and vouchers	80	50
8. Making final records	139	95
9. Entering order of court approving accounts, as in item 5	21	25
10. Copies of writs of *scire facias*	2	80
11. Duplicate copies of order of court to pay jurors and witnesses	6	80
12. Making duplicate reports to the Solicitor of the Treasury	4	25
13. Entering witness certificates on the subpœna record	15	60

The District attorney interposed three separate pleas: 1, to the jurisdiction of the court; 2, a plea of general issue, and, 3, a plea of set-off (R. p. 15).

The court allowed items 1, 2, 3, 4, 7, and 10. Items 5, 6, 8, 9, and 11 were allowed in part. Item 12 was disallowed, as was item 13 in the manner and form in which the charge was made (pp. 12, 13). Judgment was rendered for the plaintiff, August 7, 1889, for $292.35, together with costs, which were taxed at $41.90 (pp. 14, 18). From this judgment the United States appealed.

II. Brief.

1. The first item involves a charge for filing three separate papers certified up by Commissioners, the papers consisting of copy of process, bail-bond, and recognizance of witnesses.

One of the errors assigned is that the lower court erred in allowing this charge, as an order of the Circuit Judge required Commissioners to forward to the Clerk of the Circuit Court all the papers in each case, with a proper transcript of the proceedings. Such order related exclusively to the action of the Commissioners in sending papers to the Circuit Court and cannot, in any way, affect the Clerk's right to the charge for filing papers in the District Court, as they were sent up under section 1014 of the Revised Statutes, which requires the Commissioners of the Circuit Court to return copies of the process into the Clerk's office of the court *to which the defendant is bound over to appear*, together with the recognizances of the witnesses for their appearance to testify. As stated in the opinion of the lower court, the papers were returned not only in contemplation of section 1014 of the Revised Statutes, but in accordance with sections 4298 and 4429 of the Code of Alabama, which provide that all examinations and undertakings by parties or witnesses "must be returned by the magistrate to the court at which the defendant is bound to appear, by the first day thereof." The papers having been so returned, the Clerk was entitled to the statutory fee for filing them.

United States *v.* Van Duzee, 140 U. S., 170.

2. There can be no question about the charge for issuing more than one subpœna in a case. While it is the rule that the Clerk shall insert the names of as many

witnesses as practicable in the writ, there is no provision that he shall issue but one subpœna for all the witnesses in the case. The First Comptroller did not disallow the second subpœna as unauthorized; he disallowed it as "unnecessary," as if he knew better than the court ordering the issuance of the two writs, made necessary, as the witnesses lived in different places. As the court below said, the proof brought the case within the general rule. No error is assigned as to this item.

3. The charge for entering order of court overruling motion to quash indictment is for a necessary service. Every Clerk, before entering upon the duties of his office, is required to take an oath that he will truly and faithfully enter and record all the orders, decrees, judgments, and proceedings of the * * * court." Section 828, par. 8, authorizes a fee of fifteen cents for each folio necessary to enter each order. No error was assigned as to this time.

4. This item involved a balance of $137.25, which had been allowed by the First Comptroller in the settlement of the appellee's accounts, but was subsequently withheld. The United States pleaded a set-off at the trial, but failed to make any proof whatever. As stated in the opinion of the lower court, the services covered by the charge "were not only actually performed, but the account therefor had been stated and allowed by the Treasury Department," and "it became then a stated account." It was therefore *res adjudicata*.

Under section 191 of the Revised Statutes, the balance certified was conclusive upon the executive branch of the Government. But, apart from this, the law did not require the plaintiff to disprove any of the affirmative pleas of the defendants.

5. This item involves a charge for entering orders of

court approving accounts of the District Attorney, Marshal and other officers at 15 cents a folio, for two copies of each of said orders, at 10 cents a folio; for affixing certificate, 15 cents, and the seal of the court, 20 cents, to each of said copies which were attached, one to the original account, the other to the duplicate. The court allowed for entering the orders of approval, and for one copy, with certificate and seal, as this copy was required to be attached to the accounts forwarded to the Treasury Department, but disallowed the second copy attached to the duplicate accounts which, under the Act of February 22, 1875 (18 Stat. L. 333) are filed in the Clerk's office.

As to the allowance by the court below, there can be no question since the decision of this Court in United States *v.* Van Duzee (140 U. S. 171, item 3).

6. Making duplicate copies of order of court for Marshal to pay supervisors, with certificates and seals thereto. The charges involved in this item are of the same character as in item 5, and the action of the court was the same.

7. This series of items embraces charges for filing the U. S. Marshal's accounts and vouchers, disallowed by the Comptroller on the ground that the fees were not payable by the United States and that "separate fees should not be charged for filing each voucher." The object of filing is identification, and this can be only by marking each separate voucher. Each of these vouchers is important evidence of the Marshal's work, and it is the Clerk's duty to file, preserve, and identify each of them as a separate and distinct voucher. It has frequently occurred that Deputy U. S. Marshals have been indicted for presenting false accounts, and the file-mark of the Clerk was the only means of identifying the alleged fraudulent vouchers as those filed by the accused. How otherwise could an

officer state whether or not a voucher originally filed had not subsequently been secretly replaced by another? As was truly said by the court below, these vouchers are filed for the protection of the Government.

In the case of Goodrich *v.* United States (35 Fed. Rep. 193), opinion by Circuit Judge Brewer, the Clerk was similarly allowed fees for filing separately 148 vouchers to his report of money paid into the court or judicial proceedings. "It is contended by the Government," said the court, "that this report and vouchers should be taken as one paper, and he (the clerk) be allowed for filing that one paper. But in fact each voucher was a different paper, and related to a distinct transaction, and the statute allowed him for filing and entering every declaration, plea, or other paper ten cents."

To the same effect is the decision in Erwin *v.* United States (37 Fed. R. 482).

The same charge was involved in United States *v.* Van Duzee, and, while the court did not pass upon it specifically, the item was allowed. Had not the court been satisfied that the item, to which exception was taken, constituted a proper charge against the United States, there would be found such language of exception in the judgment as would make that fact clear beyond every question. A similar charge, however—filing separate papers sent up by the Commissioners—was allowed.

8. This embraces charges for recording bonds, justifications, and commitments of court in the final record in criminal cases, at 15 cents a folio. The court allowed for recording the commitment, and disallowed the recording of justifications and bonds.

While the fee-bill allows a Clerk compensation for "making any record," there is no statute prescribing what

records shall be kept. In his oath, the Clerk swears that he will "truly and faithfully enter and record *all* the orders, decrees, judgments, and *proceedings* of the court" (section 794). He is expressly excused (sec. 750) from recording in equity and admiralty cases more than the "process, pleadings, and decree, and such orders and memorandums as may be necessary to show the jurisdiction of the court and regularity of the proceedings," but as to criminal cases there is no limitation, because every step in a proceeding aiming at the enforcement of a fine or imprisonment is important and should be of record. The Code of Alabama, in defining the Clerk's duties (sec. 768, par. 9), requires him to record "all the *proceedings* relating to any suit or prosecution * * * except the subpœnas, affidavits for continuance, commissions to take testimony, evidence and executions."

This is general, and no other rule is prescribed for criminal cases. This shows that under the State law "proceedings" include even subpœnas, though the State Clerk is exempted from recording them. Surely, then, "proceedings" include the bonds taken and commitments made in the prosecution of the case.

Stanton *v.* United States, 37 Fed. R. 259.

Erwin *v.* United States, 37 Fed. R. 488.

Inasmuch, however, as the appellee in this case did not and could not by law take an appeal, he is entitled to ask nothing more than the affirmance of the judgment below. If, however, in consequence of an opinion on the part of this Court adverse to that of the court below or on any one or more of the items allowed, the judgment should be reduced, then the appellee claims the right to have erroneously disallowed items allowed him here, in order to make up the deficiency. The question before this Court

is the correctness of the *judgment* below, not the validity of the grounds given for it in the opinion. (Pennoyer *v.* Neff, 95 U. S. 714; United States *v.* Mosby, 133 U. S. 273.)

In the Van Duzee case, this Court based its decision allowing charges for incorporating in the final record transcripts from the Commissioner upon the State practice.

The law of the State in which the services are rendered must be looked into in order to determine what is necessary.

United States *v.* Ewing, 140 U. S. 143.

9. This item covers charges in all respects like those in item 5, and the same remarks apply.

10. This is item 52 of the bill of particulars—a charge for copies of *scire facias* to be served upon defendants, disallowed by the Comptroller on the ground that "charges for original covers cost of necessary copies."

When a bond is declared forfeited a judgment *nisi* is entered and a writ of *sci. fa.* issued to the Marshal to notify the obligors to show cause why it should not be made final. Under the laws of Alabama a separate copy is served upon each obligor. In passing upon the charges, the court said:

"They are legal and proper, and are allowed. Whenever an undertaking of bail is forfeited by the failure of the defendant to appear as required, a conditional judgment must be rendered in favor of the United States against the parties to the undertaking for the sum therein expressed, and a notice of the rendition of such judgment must be issued by the clerk to each defendant. This notice is called *scire facias*, and is in the nature of a writ.

* * * (Code Alabama, § 4434 & 4869.) The clerk is entitled to a fee for each writ issued by him. (Rev. Stat. § 828.) The proceeding by *scire facias* is a civil action, and the notices issued in them are original. These must be executed by the marshal and should be returned by him with the proper return thereon endorsed. The usual mode of executing process of this character is by leaving a copy of it with the defendant." (R. p. 13.)

Sections 1014, 1028, Rev. Stats.

11. This embraces items 53 and 54 of the bill of particulars, charges for duplicate of orders for Marshal to pay Supervisors, with certificates and seals thereto. The court allowed for one copy with certificate and seal, as in item 6.

12. Duplicate report to the Solicitor of the Treasury was disallowed.

13. This item is for entering on the subpœna record 104 witness certificates, stating days of attendance, number of miles traveled, amount due, &c., at 15 cents a folio.

The court disposed of the charge as follows:

"This charge for entering certificates for payment of witnesses is disallowed, as not required by law and unnecessary in the manner and form in which the same is made. When the court causes an order to be entered for the payment of witnesses the clerk should enter on the record the names of such witnesses, stating days attended, mileage, and amounts, &c., and for this service he is entitled to be paid for making the record. And it is the duty of the clerk to keep a subpœna record for all cases, in which must be entered the cases in which any subpœnas issue, the names of the witnesses, the time of the issue, and the return of the marshal. For making this record he is entitled to compensation. But I do not understand from the accounts sued on and from the proof

submitted that the charge made is for making either of the records referred to."

The judgment of the District Court should be affirmed.

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